

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NORTH DAKOTA

Brent Leray Kitzan,

Petitioner,

-vs-

Chad Pringle, Warden,

Respondent.

Case No. 3:15-cv-113

**ORDER ADOPTING REPORT AND  
RECOMMENDATION**

Pursuant to 28 U.S.C. § 636, the court has received a Report and Recommendation from the Honorable Alice R. Senechal, United States Magistrate Judge.<sup>1</sup> The Report and Recommendation recommends that the petition be dismissed without prejudice because it fails to state a claim that would entitle him to federal habeas relief. Petitioner Brent Kitzan filed objections to the Report and Recommendation, reiterating he would not have accepted the plea agreement if he had known there would be no restitution hearing.<sup>2</sup>

Kitzan concedes that his only claim for relief pertains to the restitution amount ordered by the state court. He contends he was entitled to a restitution hearing to demonstrate his inability to pay, to establish that some of the victims had been reimbursed prior to the charges being filed, and he was “innocent of some of the offense(s)” which would have affected the amount of restitution he was ordered to pay. Because Kitzan concedes his only claim pertains to the amount of restitution, this court lacks subject matter jurisdiction.<sup>3</sup>

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<sup>1</sup> Doc. #5.

<sup>2</sup> Doc. #6.

<sup>3</sup> Washington v. Smith, 564 F.3d 1350, 1350-51 (7th Cir. 2009) (federal habeas review is not available for claims that challenge only a restitution order); see United States v. Bernard, (351 F.3d 360, 361 (8th Cir. 2003) (“a federal prisoner cannot challenge the restitution portion of his sentence using 28 U.S.C. § 2255, because this statute affords relief only to prisoners claiming a right to be released from custody”).

After reviewing the record and considering Kitzan's objections, the court finds the magistrate judge's analysis of the claims in the habeas petition and recommendation for disposition is appropriate. Accordingly, the court hereby adopts the Report and Recommendation in its entirety. Kitzan's petition for habeas relief is hereby **DISMISSED** without prejudice.

Because dismissal of the petition is not debatable, reasonably subject to a different outcome on appeal, or otherwise deserving of further proceedings, this court will not issue a certificate of appealability. Further, any appeal taken would be frivolous and not in good faith and thus may not be taken *in forma pauperis*.

**IT IS SO ORDERED.**

Dated this 22nd day of February, 2016.

/s/ Ralph R. Erickson  
Ralph R. Erickson, Chief Judge  
United States District Court